



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
999 18TH STREET - SUITE 300
DENVER, CO 80202-2466
<http://www.epa.gov/region08>

March 17, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Ref: 8ENF-W

Richard D. Kor and Wesley D. Kor
20093 475th Avenue
White, SD 57276

Kor Ethanol, Inc.
20084 474th Avenue
White, SD 57276

Re: Findings of Violation and
Order for Compliance
Docket No.

Dear Messrs. Kor:

Based on our review of all available information, the United States Environmental Protection Agency ("EPA") has determined that you are in violation of the Clean Water Act, as amended ("CWA"). The CWA requires that an authorizing permit be obtained from the United States Army Corps of Engineers prior to the discharge of pollutants (i.e., dredged or fill material) into waters of the United States. See, 33 U.S.C. § 1311. Waters of the United States include both surface waters and wetlands as defined by 33 CFR § 328.3.

Specifically, you have discharged dredged and fill material into waters of the United States without authorization under the CWA. These discharges of pollutants into an unnamed tributary of North Deer Creek and its adjacent wetlands have occurred on your property located in the southwest quarter of section 28, Township 112 North, Range 49 West, in Brookings County, South Dakota.

Enclosed is an EPA Region 8 Findings of Violation and Order for Compliance ("Order"), which specifies the nature of the violations and describes actions necessary in order for you to achieve compliance with the CWA. EPA's authority for such action is provided under section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3). Pursuant to the order, within five days after you receive the order, you must inform EPA in writing of your intent to fully comply with the order.



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The CWA requires the Administrator of EPA to take all appropriate enforcement action necessary to secure prompt compliance with the CWA and any order issued thereunder. Section 309 of the CWA authorizes a variety of possible enforcement actions, including filing of a civil or criminal action, administrative penalty action, and/or debarment from Federal contracts and/or loans for any noncompliance with the CWA or an order issued pursuant to the CWA. Please be advised that the issuance of this order does not preclude civil or criminal actions in the U.S. District Court pursuant to sections 309(b) or (c) of the CWA, 33 U.S.C. §§ 1319(b) or (c), or assessment of civil penalties pursuant to sections 309(d) or (g) of the CWA, 33 U.S.C. §§ 1319(d) or (g), for the violations cited in the order.

EPA has agreed to notify small businesses of their right to comment on regulatory enforcement activities at the time of an Agency enforcement activity pursuant to the Small Business Regulatory Enforcement and Fairness Act (SBREFA). SBREFA does not eliminate your responsibility to comply with the Act or this order, nor does it create any new rights or defenses under law. We have enclosed a SBREFA information sheet containing further information on compliance assistance resources and tools available to small businesses.

Please review the order carefully. If you have any questions, the most knowledgeable people on my staff are David Rochlin, 8ENF-L, Enforcement Attorney, at 303-312-6892 and Kenneth Champagne, Enforcement Officer, at 303-312-6608.

Sincerely,

SIGNED

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Enclosures

1. Findings of Violation and Order for Compliance
2. SBREFA Information Sheet

cc: Jeanne Goodman, SD Department of Environment and Natural Resources, w/enclosures
Steven Naylor, U.S. Army Corps of Engineers, w/enclosures
David LaGrone, U.S. Army Corps of Engineers, w/enclosures
Natalie Gates, U.S. Fish & Wildlife Service, w/enclosures
Scott Larson, U.S. Fish & Wildlife Service, w/enclosures
Tina Artemis, EPA, 8RC, w/enclosures

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

IN THE MATTER OF:)	FINDINGS OF VIOLATION AND
)	ADMINISTRATIVE ORDER FOR
Richard D. Kor and Wesley D. Kor)	COMPLIANCE
20093 475th Avenue)	
White, SD 57276)	
)	Docket No. CWA-08-2004-0034
and)	
)	
Kor Ethanol, Inc.)	
20084 474th Avenue)	
White, SD 57276)	
)	
)	
Respondents.)	
_____)	

I. STATUTORY AUTHORITY

These Findings of Violation and Administrative Order for Compliance (“Order”) are issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (“EPA”) by section 309 of the Clean Water Act (“CWA”), 33 U.S.C. § 1319. This authority has been properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8. The Order is based on section 301(a) of the CWA, 33 U.S.C. § 1311(a), which, among other things, prohibits the discharge of pollutants into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.

II. FINDINGS OF VIOLATION

1. Kor Ethanol, Inc. became incorporated in the State of South Dakota on July 13, 1998 and was a corporation during the time of the unauthorized activities described in paragraphs 5

and 8 of Section II of this Order. Kor Ethanol, Inc.'s address is 20084 474th Avenue, White, SD 57276, and its registered agent is Wesley D. Kor. Kor Ethanol, Inc.'s status as corporation became inactive on October 28, 2003 when the State of South Dakota administratively cancelled its registration as a corporation.

2. Respondents are individuals residing in Brookings County, South Dakota.
3. At all relevant times, Respondents owned, controlled, and/or operated property containing an unnamed tributary of North Deer Creek. The property is located within the southwest quarter of section 28, Township 112 North, Range 49 West, in Brookings County, South Dakota ("Kor Property"). Wetlands are located adjacent to the unnamed tributary.
4. The unnamed tributary and its adjacent wetlands are tributary to North Deer Creek, which is tributary to the Big Sioux River, which is tributary to the Missouri River. The Missouri River is and was at all relevant times a navigable, interstate water.
5. On or about May 7, 2001, Respondents, using their own equipment, began excavating a new stream channel, filling adjacent wetlands with the sidecast materials, and filling the original unnamed tributary to North Deer Creek for the purpose of supplying water for an ethanol plant and livestock feedlots, preventing localized flooding, and developing fish rearing cells for commercial production of fish.
6. On June 4, 2002, the U.S. Army Corps of Engineers' ("Corps") South Dakota Regulatory Office conducted an inspection of the Respondents' property, as described in paragraph 3 of Section II of this Order, based on reports by the U.S. Fish and Wildlife Service and the U.S. Natural Resources Conservation Service of possible impacts to wetlands. The Corps found, and EPA through issuance of this Order finds, that Respondents discharged dredged or fill material and /or caused dredged or fill material to be discharged into the unnamed tributary

and its adjacent wetlands located on the Kor Property.

7. By letter dated July 8, 2002, the Corps found that Respondents' actions, as described in paragraph 5 of Section II of this Order, required prior Corps authorization and that the required authorization was neither applied for prior to the discharge, nor granted. Further, the Corps directed Respondents to "cease and desist" any further unauthorized work at the Kor Property.
8. On May 8, 2003 the Corps conducted an inspection of the Respondents' property after receiving complaints of additional unauthorized activities occurring after the Corps' June 4, 2002 inspection. The Corps found, and EPA through the issuance of this Order finds, that during additional excavation and stream channelization, Respondents discharged dredged or fill material and /or caused dredged or fill material to be discharged into the unnamed tributary and its adjacent wetlands located on the Kor Property. These continued unauthorized activities by the Respondents were in violation of the Corps' July 8, 2002 cease and desist letter.
9. In a letter dated June 10, 2003, and subsequent phone conversations on July 10, 2003, August 25, 2003, and October 1, 2003, the Corps requested the Respondents to submit within thirty (30) days a work plan addressing the purpose of the project and the project details, including the existing work and any future work proposed at the Kor Property. After numerous unsuccessful attempts to obtain the requested information from the Respondents, the Corps referred the case to EPA for enforcement on October 20, 2003.
10. The unauthorized activities described in paragraphs 5 and 8 of Section II of this Order resulted in the excavation of a new stream channel of approximately 2,675 feet and the filling of approximately 1.75 acres of adjacent wetlands. The loss of meander length of the

unnamed tributary of North Deer Creek has not been determined; however the loss is greater in size than the new stream channel. The Respondents' unauthorized activities adversely altered the hydrology and flow characteristics of the stream with associated impacts upstream and downstream, including the change in character and nature of the stream from a shallow vegetated waterway to a deep, non-vegetated waterway. These effects increase the potential for greater erosion to the Kor property and that of its neighbors.

11. The activities described in paragraphs 5 and 8 of Section II of this Order were performed using common earthmoving vehicles and equipment, all of which were operated by Respondents or on behalf of Respondents.
12. Respondents are "persons" within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).
13. The discharged dredged material referenced in paragraphs 6 and 8 of Section II of this Order are and were at all relevant times "dredged material" within the meaning of 33 CFR § 323.2(c) and "pollutants" within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).
14. The discharged fill material referenced in paragraphs 6 and 8 of Section II of this Order are and were at all relevant times "fill material" within the meaning of 33 CFR § 323.2(e) and "pollutants" within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).
15. The creeks and wetlands filled and disturbed by Respondents' unauthorized activities provided various functions and values, including: wildlife habitat for birds, mammals, reptiles and amphibians; water quality enhancement; flood attenuation; and/or aesthetics.
16. Some, if not all, of the unnamed tributary of North Deer Creek where dredged or fill material was discharged by Respondents is habitat of the Topeka Shiner (*Notropis topeka*) or directly

flows into habitat of the Topeka Shiner, an endangered species under the Endangered Species Act, 16 U.S.C. § 1531, *et seq.*

17. The vehicles and equipment described in paragraph 11 of Section II of this Order are and were at all relevant times each a “point source” within the meaning of section 502(14) of the CWA, 33 U.S.C. § 1362(14).
18. The unnamed tributary of North Deer Creek and its adjacent wetlands referenced in paragraphs 3 and 4 of Section II of this Order are and were at all relevant times “waters of the United States” within the meaning of 33 CFR § 328.3(a) and therefore “navigable waters” within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7).
19. The placement of dredged or fill material into the unnamed tributary of North Deer Creek and its adjacent wetlands constitutes the “discharge of pollutants” within the meaning of section 502(12) of the CWA, 33 U.S.C. § 1362(12).
20. Section 301(a) of the CWA, 33 U.S.C. § 1311, prohibits, among other things, the discharge of pollutants by any person into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.
21. Section 404 of the CWA, 33 U.S.C. § 1344, sets forth a permitting system authorizing the Secretary of the Army, acting through the Chief of Engineers of the Corps, to issue permits for the discharge of dredged or fill material into navigable waters which are defined as waters of the United States.
22. 33 CFR § 323.3(a) specifies that, unless exempted pursuant to 33 CFR § 323.4, a permit issued by the Corps is required for the discharge of dredged or fill material into waters of the United States.
23. Respondents are not and never have been authorized by a permit issued pursuant to section

404 of the CWA, 33 U.S.C. § 1344, to conduct any of the activities described in paragraphs 5 and 8 of Section II of this Order.

24. Respondent's activities described in paragraphs 5 and 8 of Section II of this Order violate section 301 of the CWA, 33 U.S.C. § 1311. Each discharge of pollutants from a point source by Respondent into waters of the United States without the required permits issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a). Each day the discharges remain in place without the required permits constitutes an additional day of violation of section 301(a).
25. The removal of the dredged or fill material illegally discharged into waters of the United States at Respondents' property and restoration of the impacted waters, including the unnamed tributary of North Deer Creek and its adjacent wetlands, to a condition that closely approximates their condition and function prior to the discharge of the dredged or fill material, can be achieved as a practical matter through commonly used methods of construction, digging, revegetation, and best management practices.
26. Activities to be carried out under this Order are remedial, not punitive, and are necessary to achieve the CWA's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," as specified in section 101(a) of the CWA, 33 U.S.C. § 1251(a). The removal and restoration described in paragraph 25 of Section II of this Order are appropriate to alleviate actual and potential harm to water quality, aquatic habitat, and wildlife habitat caused by Respondents' unpermitted activities.
27. This Order was issued after consultation and coordination with the U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service.

III. ORDER

Based upon the foregoing FINDINGS OF VIOLATION, and pursuant to the authority vested in the Administrator of the EPA pursuant to sections 308 and 309(a) of the CWA, 33 U.S.C. §§ 1318 and 1319(a), as properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8, it is hereby ORDERED:

1. Respondents shall immediately terminate all unauthorized discharges of dredged or fill material, now and in the future, into waters of the United States, unless specifically authorized by the Corps under a valid permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344. This prohibition includes all mechanical land clearing, dredging, filling, grading, leveling, installation of utilities, construction, and any other activities that result in a discharge of dredged or fill material into waters of the United States.
2. Within five (5) calendar days of receipt of this Order, Respondents shall inform EPA in writing of Respondents' intent to fully comply with the Order. EPA requests that Respondents meet with EPA within fourteen (14) calendar days of issuance of this Order if there are concerns or questions about the requirements of the Order. The scheduling of such a meeting shall not alter Respondents' responsibility to meet any of the deadlines specified in this Order unless otherwise clearly stated in a written communication to Respondents by EPA.
3. Upon EPA approval of the Restoration Plan required by paragraph 7 of Section III of this Order, Respondents shall remove all dredged or fill materials that were discharged as a result of the violations identified in this Order and restore the unnamed tributary of North Deer Creek and its adjacent wetlands, and any other impacted areas to their pre-impact conditions and grade, unless otherwise approved by EPA in the Restoration Plan.

4. All dredged or fill material removal and restoration activities shall be conducted in accordance with an EPA-approved restoration plan prepared by a consultant experienced in stream and wetland restoration and Topeka Shiner habitat whose qualifications are acceptable to EPA. The consultant also shall directly supervise all work performed pursuant to the EPA-approved restoration plan. A statement of the consultant's qualifications, including professional resume and business references, shall be submitted to EPA within twenty-one (21) calendar days of receipt of this Order.
5. All dredged or fill material removal and restoration activities conducted pursuant to this Order and involving the use of heavy construction equipment shall be undertaken by an equipment operator experienced in stream and wetland restoration whose qualifications are acceptable to EPA. A statement of the equipment operator's qualifications, including professional resume and business references, shall be submitted to EPA within twenty-one (21) calendar days of receipt of this Order.
6. Within seven (7) calendar days of any disapproval by EPA of the qualifications of the consultant or equipment operator referenced in paragraphs 4 and 5 of Section III of this Order, Respondents shall submit the professional resume of a qualified individual who is acceptable to EPA.
7. Within forty-five (45) calendar days of the receipt of this Order, Respondents shall submit to EPA for review and comment a Restoration Plan, prepared by the consultant referenced in paragraph 4 of Section III of this Order, for removing the discharged dredged or fill material from the unnamed tributary meander and its adjacent wetlands and restoring the unnamed tributary and its adjacent wetlands to its pre-impact channel configuration and grade.
8. The Restoration Plan shall be prepared in accordance with "U.S. Environmental Protection

Agency - Region VIII Section 404 Enforcement: General Guidelines for Removal and Restoration Plans and Habitat Mitigation and Monitoring Proposal Guidelines,” attached

hereto as Exhibit A. In addition, the Restoration Plan shall include:

- a. A complete assessment of the impacts to the unnamed tributary of North Deer Creek and its adjacent wetlands due to the Respondents’ actions as described in paragraphs 5 and 8 of Section II of this Order;
- b. A detailed work plan and schedule for all of the work to be accomplished by the Restoration Plan, including the application for any required permits, providing for completion of all aspects of the restoration work no later than sixty (60) days after EPA approves the Restoration Plan;
- c. Locations of the existing natural features and man-made improvements, including all surface disturbance, fills, channel excavations, road crossings, culverts, structures, and any other work, including a corresponding map (scale 1":100') of these locations;
- d. Locations and delineations of all wetlands. The delineation shall be performed in accordance with the procedures in the “Corps of Engineers Wetlands Delineation Manual, January 1987 - Final Report,” including the procedures for atypical situations, and subsequent interpretive guidance published by the Corps;
- e. Grading, planting, and monitoring plans, measurable criteria for success of restoration and mitigation, and provisions for proper disposal of any excess soils or other materials generated during construction and restoration;
- f. Identification of all areas that, prior or subsequent to the Respondents’ activities described in paragraphs 5 and 8 of Section II of this Order, may have been habitat, or adversely impacted upstream or downstream habitat for the Topeka Shiner, and measures

for restoring those areas such that they once again provide adequate habitat for the Topeka Shiner; and

- g. Detailed professional drawings of the restoration site, including plan and profile drawings with control elevations.
9. EPA will review the Restoration Plan and approve it, approve it with modifications, or reject it with comments. If EPA rejects the Restoration Plan, Respondents shall, within fifteen (15) calendar days of receipt of EPA's rejection letter, submit a revised plan that corrects the deficiencies identified by EPA.
10. Upon receiving EPA's written approval of the Restoration Plan, Respondents shall obtain all necessary permits to implement the EPA-approved plan and then commence restoration activities in accordance with the approved plan, including the time frames specified therein, and all granted permits. Respondents shall demonstrate that all necessary permits have been granted by providing complete copies of all such permits, and any amendments thereto, to EPA within seven (7) calendar days of issuance of each permit.
11. This Order is not a permit or an authorization to place or discharge dredged or fill material in waters of the United States. Respondents shall consult with the Corps at the address and telephone number below to determine if any work to be performed pursuant to this Order requires a permit from the Corps under section 404 of the CWA. If required, Respondents shall obtain such permit(s) and provide a copy to EPA pursuant to paragraph 10 of Section III of this Order prior to initiating any work that is to be performed pursuant to this Order.

U.S. Army Corps of Engineers
South Dakota Regulatory Office
28563 Powerhouse Road, Room 118
Pierre, SD 57501
Telephone: 605-224-8531

12. Respondent shall submit three (3) copies of the Restoration Plan, all notifications, and related correspondence to:

Kenneth Champagne, 8ENF-W
U.S. Environmental Protection Agency, Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466
Telephone: 303-312-6608
Facsimile: 303-312-6409

A copy of the restoration plan, all notifications, and related correspondence shall also be provided to:

David Rochlin, 8ENF-L
U.S. Environmental Protection Agency, Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466
Telephone: 303-312-6892
Facsimile: 303-312-6953

13. Any deliverables, plans, reports, specifications, schedules, and attachments required by this Order are, upon approval by EPA, incorporated into this Order. Any non-compliance with such EPA-approved deliverables, plans, reports, specifications, schedules, and attachments shall be deemed a failure to comply with this Order and subject to EPA enforcement.
14. Respondents shall allow or use their best efforts to allow access by any authorized representatives of EPA or its contractors, the Corps, the Natural Resources Conservation Service, the U.S. Fish and Wildlife Service, the South Dakota Game, Fish, and Parks, and the South Dakota Department of Environment and Natural Resources, upon proper presentation of credentials, to sites and records relevant to this Order for any of the following purposes:
- a. To inspect and monitor progress of the activities required by this Order;

- b. To inspect and monitor compliance with this Order; and
- c. To verify and evaluate data and other information submitted to EPA.

This Order shall in no way limit or otherwise affect EPA's authority, or the authority of any other governmental agency, to enter the site, conduct inspections, have access to records, issue notices and orders for enforcement, compliance, or abatement purposes, or monitor compliance pursuant to any statute, regulation, permit, or court order.

15. This Order shall be effective upon receipt by Respondents.
16. Please be advised that section 309(d) of the CWA, 33 U.S.C. § 1319(d), authorizes civil penalties of up to \$27,500 per day for each violation which occurred before March 15, 2004, and \$32,500 per day for each violation thereafter, of section 301 of the CWA, 33 U.S.C. § 1311, and for each violation of an order issued by the Administrator of EPA under section 309(a) of the CWA, 33 U.S.C. § 1319(a). Additionally, section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes EPA to impose administrative penalties for violations of the CWA. Further, section 309(c) of the CWA, 33 U.S.C. § 1319(c), authorizes fines and imprisonment for willful or negligent violations of the CWA. Issuance of this Order shall not be deemed to be an election by the United States to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for violations giving rise to the Order.
17. Compliance with the terms and conditions of the Order shall not be construed to relieve Respondents of Respondents' obligation to comply with any applicable Federal, state, or local law or regulation. Failure by Respondents to complete the tasks described herein in the manner and time frame specified pursuant to this Order may subject Respondents to a civil action under section 309 of the CWA, 33 U.S.C. § 1319, for violation of this Order.

DATED this 12TH day of March, 2004.

SIGNED

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

**IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE
REGIONAL HEARING CLERK.**

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON MARCH 17, 2004.